

1993

Coelho v. Coelho : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARY COELHO,	:	
	:	
Plaintiff/Appellant,	:	Case No. 930350-CA
	:	
v.	:	Priority No. 15
	:	
ALCIDES J. COELHO,	:	
	:	District Court 11093
Defendant/Appellee,	:	
Cross-Petitioner.	:	

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BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE OF THE
THIRD JUDICIAL DISTRICT, SUMMIT COUNTY, UTAH,
THE HONORABLE DAVID S. YOUNG, PRESIDING

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FILED
Utah Court of Appeals

NOV 12 1993


Mary T. Noonan
Clerk of the Court

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARY COELHO,	:	
	:	
Plaintiff/Appellant,	:	Case No. 930350-CA
	:	
v.	:	Priority No. 16
	:	
ALCIDES J. COELHO,	:	
	:	District Court 11093
Defendant/Appellee,	:	
Cross-Petitioner.	:	

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the court abused its discretion by substantially and arbitrarily reducing the time allowed for trial, based on the court's own time restrictions, thereby denying Plaintiff adequate opportunity to present her case and to cross-examine the Defendant.

2. Whether the court abused its discretion by excluding relevant evidence offered by the Plaintiff and by its refusal to review documentary evidence presented at trial.

3. Whether the court's findings as to the parties' gross monthly incomes were clearly erroneous and resulted in an inadequate award of financial support to the Plaintiff.

4. Whether the court abused its discretion in its allocation of the IRS debt and the equity credit line mortgage equally between the parties.

5. Whether the court abused its discretion by arbitrarily awarding Plaintiff only one-third of the attorney's fees and costs actually incurred by her.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARY COELHO,	:	
	:	
Plaintiff/Appellant,	:	Case No. 930350-CA
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BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE OF THE
THIRD JUDICIAL DISTRICT, SUMMIT COUNTY, UTAH,
THE HONORABLE DAVID S. YOUNG, PRESIDING

APPELLANT'S JURISDICTIONAL STATEMENT

Jurisdiction of this Court is conferred pursuant to the provisions of §78-2a-3(2)(i) Utah Code Ann. (Supp. 1993) This action involves the appeal of certain provisions of Findings of Fact, Conclusions of Law and Decree of Divorce signed and entered in the Third Judicial District Court in and for Salt Lake County, State of Utah on April 29, 1993. A timely Notice of Appeal was filed on May 26, 1993.

DETERMINATIVE AUTHORITY

Copies of the following are found in Addendum A to this brief:

Utah Code Ann. § 30-3-3

Utah Code Ann. § 78-45-7.5(5)

STATEMENT OF THE CASE

Mrs. Mary Coelho, the plaintiff-appellant in this case, filed a complaint against her husband, Alcides J. Coelho, the defendant-respondent, seeking a decree of divorce, sole custody of the parties' minor children, alimony, child support, a fair and equitable division of the real and personal property, and attorney's fees. The case was tried before the Honorable David S. Young for two and one-half hours on February 11, 1993.

Each side was represented by counsel and presented documentary evidence. Mrs. Coelho testified, but Mr. Coelho's testimony was proffered by his counsel due to the time constraints imposed by the court. In addition, Mr. Coelho presented testimony of two witnesses, both of whom had provided tax and accounting services on his behalf.

After brief closing arguments, the trial court ruled from the bench. Defendant's counsel submitted Findings of Fact, Conclusions of Law and Decree of Divorce on April 9, 1993. Plaintiff's counsel filed her Objections to Findings of Fact, Conclusions of Law and Decree of Divorce on April 19, 1993. On April 29, 1993, after defendant's counsel submitted his Reply to Objections, the court entered its Minute Entry denying the objections and entering the

Findings of Fact, Conclusions of Law and Decree of Divorce that had been submitted by defendant's counsel. Plaintiff's Notice of Appeal was filed on May 26, 1993.

STATEMENT OF THE FACTS

The plaintiff/appellant, Mrs. Mary Coelho (hereinafter Mrs. Coelho or wife), and defendant/respondent, Alcides J. Coelho (hereinafter Mr. Coelho or husband), were married on July 16, 1977. (Tr.p. 59 line 18) Three children were born as issue of this marriage, Sara, now 15 years of age, born August 7, 1978; Tony, now 13 years of age, born August 19, 1980; and Emily, now 7 years of age, born September 29, 1986. (R. 2, 13) At the trial, the parties stipulated that the two youngest children would remain in Mrs. Coelho's custody, and that the oldest child would remain in the custody of Mr. Coelho. (Tr.p. 4, lines 7-9) The parties stipulated to liberal visitation for each of them with the child or children not in their physical custody. (Tr.p. 4-5)

The parties' middle child, Tony, is handicapped and has been diagnosed with Attention Deficit Disorder (ADD), (Tr.p. 61, line 6), with hyperactivity and multiple learning disabilities. (Tr.p. 61 line 7) Tony requires substantial personal time, attention and care from Mrs. Coelho (Tr.p. 61 lines 11-18; Tr. p.66 lines 20-25; Tr.p. 67, lines 1-25; Tr.p. 68, lines 1-25), and receives regular psychological therapy and medication. (Tr. p.63, lines 9-25; Tr.p. 64, lines 1-15)

After the parties married, Mrs. Coelho did not complete her college education as an art major. (Tr.p. 71 lines 19-21; line 23) She held various jobs, in addition to being a full-time homemaker and mother. (Tr.p. 73, lines 5-13) Over the course of the marriage, she worked as a real estate agent during the 1980's (Tr.p. 74, lines 16-17), as a ski repairer (Tr.p. 73, line 8), and as a bookkeeper for Mr. Coelho's business. (Tr.p. 73, lines 12-13)

At the time of trial, Mrs. Coelho was a full-time pre-nursing student. (Tr.p. 81, lines 3-4) She was also working fifty hours per week at two jobs, one as a ski instructor (seasonal) (Tr.p. 80, line 23), and the other as a trainer in a center for handicapped adults. (Tr.p. 80, line 23) Plaintiff's gross monthly combined earnings from the two jobs were approximately \$1,329. (Tr.p. 80-83, Exhibits 12, 13)

Mr. Coelho is a contractor and ran his own business, Coelho Construction Company, during most of the marriage. (R-341) His earnings during the last three years of the parties' marriage, before deductions for necessary and discretionary business expenses, were \$69,032 in 1990 (Exhibit 9); \$76,954 in 1991 (Exhibit 10); and \$95,346 in 1992. (Exhibit 21) Mr. Coelho's business expenses, as shown on the tax returns (Exhibits 8, 9, 10), included deductions for depreciation, use of personal residence as an office, telephone charges, and entertainment. At the time of trial, Mr. Coelho was still self-employed, but proffered that his

projected income for 1993 would be less than his 1992 net schedule "C" income of \$95,346. (Tr.p. 124, line 24)

At the time the Plaintiff filed for divorce, the parties owned a home, a 1984 Toyota 4-Runner, a 1983 Toyota Landcruiser, a 1976 Ford truck, two (2) horses and tack, a horse trailer, various items of household furniture and furnishings, and interests in two businesses known as Solamere Partnership and New Classic Development. (R. 4-7) The home had an agreed upon value of approximately \$300,000 (Tr.p. 3); a first mortgage against it of approximately \$140,000 (Tr.p. 12); and a second mortgage obligation, a line of credit, which had a balance of approximately \$34,000 at the time of trial. (Tr.p. 12)

Prior to the trial, Mr. Coelho moved the court to allow him to use this line of credit to pay his temporary support obligations (R. 115-116), and in its Minute Entry on December 16, 1992, the court granted the motion, reserving the issue of whether Mr. Coelho would be required to repay the amounts used until time of trial. (R. 273) At the trial, Mrs. Coelho proffered that at least \$7,000 of the line-of-credit was incurred by Mr. Coelho to pay his temporary support obligations during the last few months of 1992. (Tr.p. 13)

Mrs. Coelho testified that her earnings as a real estate agent had fluctuated greatly and that in the one year in which she had substantial earnings from sales, 1985, it was due to the fact that she had received a very large commission on the sale of one

property. (Tr.p. 75, lines 15-20) The commission was paid to Mrs. Coelho over three years, with her receiving the largest portion in one year and \$10,000 a year for the following two years. (Tr. p. 75, lines 23-24) In subsequent years, her earnings dropped dramatically, and the increasing needs of the children demanded that she spend more and more time at home attending to their needs. (Tr.p. 76; lines 4-10) Mrs. Coelho also testified that her average net earnings, including extra amounts earned during the busy Christmas ski season, were \$1,121.54 per month (Exhibit 15), and that her monthly expenses, for herself and two of the parties' three children, were \$3,560.00. (Exhibit 14) Mrs. Coelho testified that she had a monthly shortfall, between the amount of income she could generate through her own efforts and the expenses for herself and the two children, of \$2,438.46. (Tr.p. 85, line 11)

Plaintiff's counsel offered evidence at trial regarding the availability of construction work in both Park City and Summit County (Tr.p. 10, lines 10-25; Tr.p. 11, lines 1-4) to establish that there was ample work available in the area and to substantiate her claim that Mr. Coelho was voluntarily underemployed. Defendant objected on the basis of relevancy, and the court excluded this evidence from its determinations. (Tr. 93, lines 11-12)

At trial, Mr. Coelho did not testify, but his counsel proffered his testimony to the court, including Mr. Coelho's claim that, while 1992 was a very good year (Tr.p. 125, line 4), he believed he would not make as much in 1993. Mrs. Coelho's counsel

was not allowed to cross-examine Mr. Coelho regarding his testimony because of the time limitations imposed by the court. However, Mrs. Coelho took the position that the court should find that Mr. Coelho's monthly income averaged over the years 1989 through 1992 was \$6,500. Mr. Coelho's counsel proffered at trial that his living expenses were \$3,490 per month. (Exhibit 25)

At the conclusion of the proffer, the trial court asked the parties to waive closing arguments or, in the alternative, return the following day for that purpose. Because of other commitments, counsel had minimal time to argue the evidence but chose to proceed. The trial court asked counsel to suggest approximate levels of support that should be awarded, and advised counsel for the plaintiff that it would not take the time to review the documentary evidence she submitted at trial. (Tr.p. 128, lines 13-25)

The trial court, ruling from the bench, found that Mrs. Coelho's income was the amount of \$1,500 per month (Tr.p. 138, line 25), and that Mr. Coelho's income was \$5,000 per month. (Tr.p. 136, line 24) The court, in its ruling:

(a) awarded child support to Mrs. Coelho in the amount of \$619.00 per month; (Tr.p. 139, lines 1-2)

(b) ordered the parties to share the costs in Tony's therapy proportionately, with Mrs. Coelho to pay 30% and Mr. Coelho to pay 70% of said costs; (Tr.p. 139, lines 20-24)

(c) awarded alimony to Mrs. Coelho in the amount of \$1,000 per month, for a period of one year, (Tr.p. 139, line 6), at which time she could petition the court for a reevaluation to determine whether alimony should be terminated at that time or extended based upon the circumstances then existing; (Tr.p. 139, lines 6-10)

(d) ordered Mrs. Coelho to pay one-half of any tax liability owed by the parties for the 1992 tax year (Tr.p. 141; lines 18-23), despite the fact that the parties had lived apart since October 7, 1991; (R. 30)

(e) ordered that Mrs. Coelho's one-half of the net proceeds resulting from the sale of the home be reduced by one-half of the total amount of the equity line mortgage, despite the fact that Mr. Coelho had used a substantial portion of it to satisfy his temporary support obligations; (Tr.p. 141, lines 1-17) and

(f) awarded Mrs. Coelho the sum of \$3,000 for her attorney's fees and costs incurred in the action (Tr.p. 140, lines 5-7), despite her claim for fees in excess of \$10,000;

The Findings of Fact, Conclusions of Law, and Decree of Divorce, prepared by Mr. Coelho's counsel were, over the objection of Mrs. Coelho's counsel, were signed and entered by the court on April 29, 1993. (A copy of each is included in Addendum B to this Brief.)

Mrs. Coelho filed her Notice of Appeal on May 26, 1993. (R. 361-62)

SUMMARY OF ARGUMENTS

1. It was an abuse of discretion to arbitrarily restrict the time allowed for Mrs. Coelho to present her case, without prior notice or opportunity to prepare for such restrictions.

2. It was prejudicial error for the court to allow Mr. Coelho's testimony to be proffered, thereby denying Mrs. Coelho's counsel the right to cross-examine him, and it was also prejudicial error to refuse to review the documentary evidence submitted by Plaintiff at trial.

3. It was prejudicial error to exclude evidence of the availability of construction in Park City and Summit County, thereby affecting the substantial rights of Mrs. Coelho.

4. The court's findings as to the parties' gross incomes were clearly erroneous and not supported by the evidence, and the award of financial support based on those finds was inadequate and an abuse of the court's discretion.

5. It was an abuse of the court's discretion to award Mrs. Coelho an inadequate alimony sum of \$1,000 per month, and to limit the award to a period of one year, in light of Mr. Coelho's historical ability to pay alimony, Mrs. Coelho's monthly needs, her ability to provide for her own needs, the parties' established standard of living during the marriage, and the length of the parties' marriage (16 years).

6. It was an abuse of the court's discretion to order Mrs. Coelho to pay from her share of the net proceeds resulting from the

sale of the parties' home one-half of the equity line mortgage, a substantial portion of which was incurred by Mr. Coelho to meet his temporary support obligations.

7. It was an abuse of the court's discretion to order Mrs. Coelho to pay one-half of the parties' tax obligation for 1992, when the parties had been separated since October of 1991, and Mr. Coelho's ability to pay the debt greatly exceeded Mrs. Coelho's ability.

8. It was an abuse of the court's discretion to order Mrs. Coelho to pay 30% of the therapy expenses for the parties' son, Tony, in light of the disparity in the parties' incomes.

9. It was an abuse of the court's discretion to award Mrs. Coelho only the inadequate sum of \$3,000 in attorney's fees, when her total fees exceeded \$10,000, and there was no evidence offered at trial to dispute the reasonableness of the fees or Mr. Coelho's ability to pay attorney's fees.

POINT I

THE COURT ABUSED ITS DISCRETION BY SUBSTANTIALLY RESTRICTING THE TIME ALLOWED FOR TRIAL, WITHOUT NOTICE TO THE PARTIES, THEREBY DENYING PLAINTIFF ADEQUATE OPPORTUNITY TO PRESENT HER CASE AND CROSS-EXAMINE DEFENDANT.

Inherent in the right to access to the courts, as outlined in Article I §§ 7 and 11 of the Constitution of Utah, a party is entitled to present its case to the trial court. In this case, however, the Plaintiff was denied the opportunity to do so. Due to the court's admonitions to counsel as to the limited time available

for trial -- a total of little more than two (2) hours -- Plaintiff was prohibited from calling witnesses she had intended to call; she was hurried in her testimony; and she was unable to cross-examine the Defendant.

The parties were scheduled and prepared for a full day of trial. Instead, when they arrived, the court advised counsel that they would have until noon to present their case because the judge had a meeting. The transcript of the trial, which is only 145 pages long, indicates that the hearing began at 9:20 that morning. The first 58 pages of the transcript record the discussions between the court and counsel regarding the stipulated issues and the issues remaining for trial. The court's time restrictions concerned counsel for both parties, and they expressed this concern at trial. Presentation of evidence began on page 59 of the transcript when Mrs. Coelho took the stand. Mr. Coelho's counsel, concerned about the time allocated between the parties, inquired of the court:

Mr. Dart: So that we are measuring our [time] like high school debaters are we going to go to 12:00 or 12:05?

Judge Young: I am supposed to be in Salt Lake at 12:00, which I obviously won't make, so I will let you have til 12:00 o'clock.

Over the remaining pages of the transcript, the court and counsel made several references to the time:

a) The court stated that certain issues could be dealt with by proffer, and it did not "need to hear testimony about them." (Tr.p.52, lines 4-7)

b) The judge admonished Mrs. Coelho's counsel that he was "concerned about the allocation of time," and that he did not know "whether [the testimony being offered] [was really going to help [the court]]." (Tr.p.78, lines 6-8)

c) Mr. Coelho's counsel expressed concern about the time and the court notified Mrs. Coelho's counsel that she was "about through" and further stated that he "[didn't] know why some of this [testimony] could not be stipulated to without laboriously going through this [testimony]." (Tr.p. 86, lines 16-22)

d) The judge told counsel that "[he] did have a problem on time. I'm sorry that I have that, but the Chief Justice called a meeting." (Tr.p. 86, lines 22-23)

e) After Mr. Coelho's counsel had cross-examined one of his witnesses, the court asked him to advise it as to what he "anticipated in [his] last witness in terms of testimony." (Tr. p. 123, lines 25; p. 124, line 1)

f) The court stated, at the close of the evidence, that it "[had] a couple of options," and asked counsel if they wanted to "waive argument" or "come back for about a half an hour argument" on the following morning. (Tr.p. 127, lines 23-25)

g) The judge stated that "the problem that [he] [had], obviously, is pressure on time, and [he][needed] to both be

sensitive to [their] opportunities to be adequately heard and also to the pressures that [he had] in terms of commitment to the judicial council." (Tr. p. 136, lines 4-8)

The bottom line is that Mrs. Coelho expected a full day of trial and had subpoenaed witnesses to appear on her behalf. When the court advised counsel that they had less than two hours to try the case, she had only enough time to testify as to very basic information and no opportunity to corroborate that testimony through her scheduled witnesses. The time restrictions, imposed by the court without prior notice to the parties, were arbitrary and prejudicial to Mrs. Coelho.

Mr. Coelho will contend that the trial court "cured" its haste when, in its Minute Entry dated April 29, 1993, it invited the parties to file their motions for a new trial if the time constraints remained "a concern." (R. 330-331).

In light of the hurried nature of the trial itself, Mrs. Coelho did not believe that she would gain any benefit by filing a motion for a new trial and did not pursue that course. In addition, with more than \$7,000 in attorney's fees and costs that the court ordered her to bear, it was economically prohibitive for her to consider further proceedings in the lower court. This decision was not unreasonable.

The court also denied Mrs. Coelho adequate access to the court when it asked Mr. Coelho's counsel to proffer his testimony, thereby prohibiting Mrs. Coelho from cross-examining him and

affording no opportunity for the court to judge the credibility of his testimony. Taking such evidence by proffer is a violation of Rule 43, Utah Rules of Evidence, which provides:

(a) Form. In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

(emphasis added)

The Utah Supreme Court had the opportunity to interpret the provisions of Rule 43 as it is applied to motions in the case of Stan Katz Real Estate Inc. v. Chavez, 565 P.2d 1142 (Utah 1977).

The court stated:

We recognize that Rule 43(e) allows the District Court to grant or deny a motion on the sole or combined bases of affidavits, depositions or oral testimony. However, when no depositions have been taken and disputed material facts are alleged in opposing affidavits, there should be an evidentiary hearing to aid in the resolution of those facts. The reasons for requiring an evidentiary hearing under the circumstances were enunciated in Autera v. Robinson, 136 U.S. App. D.C. 216, 419 F.2d 1197, 1202 (1969), as follows:

'Had no factual dispute arisen to plague the parties' substantive rights' we would perceive no difficulty in the judge's acceptance as a predicate for his action, of the facts represented through statements by members of the bar and affidavits of the parties or others. In this case, however, despite the factual questions developing as the hearing moved along, no opportunity was afforded anyone to test any representation by the chastening process of cross-examination . . . The opportunity to judge credibility was non-existent as to the absent affiant; the opportunity to probe by cross-examination was completely lacking. Without those twin tools, normal in the trial of factual issues, the factual conclusion was certain to take on an unaccustomed quality of artificiality . . . we recognize, of course, that trial judges have a discretion to hear and determine ordinary

motions either on affidavits or oral testimony portraying facts not appearing of record. We note, however, that an attempted resolution of factual disputes on conflicting affidavits alone may pose the question whether the discretion was properly exercised.'

565 P.2d at 1143. (Although the Utah Supreme Court cited Rule 43(e) and not 43(b), the court quoted the provisions of 43(e) in footnote no. 2, and it is identical to the current language of Rule 43(b).)

The portion of Rule 43 at issue in the Katz case relating to receiving oral testimony in support of motions is discretionary. By contrast, the provision applicable to this case, subsection (a), is mandatory. At trial, therefore, it is even more important to afford a party the opportunity to test the representations made by "the chastening process of cross-examination" and allow the trial court an opportunity to judge the credibility of witnesses by hearing oral testimony. By allowing Mr. Coelho to proffer his testimony, the trial court in this case denied Mrs. Coelho the opportunity for cross-examination and denied itself the opportunity to judge Mr. Coelho's testimony. Therefore, on disputed issues of fact, the court's findings and conclusions, in the words of the Supreme Court, take on a "quality of artificiality" which substantially affected Mrs. Coelho's rights in this action.

This case should be remanded to the trial court for a new trial, consistent with the requirements of Rule 43, and allowing Mrs. Coelho adequate time to present her case.

POINT II

THE COURT ABUSED ITS DISCRETION BY EXCLUDING RELEVANT EVIDENCE OFFERED BY PLAINTIFF AND BY ITS REFUSAL TO REVIEW DOCUMENTARY EVIDENCE PRESENTED AT TRIAL

One of the primary issues before the court was whether Mr. Coelho's 1993 income would be considerably less than his 1992 income. Mr. Coelho took the position that his 1993 income would be substantially less than his 1992 income due to factors beyond his control, but Mrs. Coelho argued that he was simply "posturing" in anticipation of trial. To establish that Mr. Coelho was in fact capable of earning at or in excess of his historical level, Mrs. Coelho attempted to introduce certain evidence at trial that would substantiate the building activity that had been occurring in both Park City and Summit County. This evidence included summaries of records of building permits recently issued in Park City and Summit County. Mr. Coelho objected on the basis of relevance, and the court sustained the objection and stated:

Judge Young: Well, I can't even begin to believe that I would be making a decision on the basis of the building permits that are offered in Park City. There are so many variables as to whether those building permits are comparable, whether he could do that kind of work, whether he is the one that solely gets a building permit. There are just too many variables for me to make a decision on that basis.

Ms. Saunders: Okay. My only point in showing it, irrespective of how the court rules, and this is for the record, it is to show if Mr. Coelho claims there is no work available in Summit County or Park City that there is certainly a great amount of activity that goes on, and whether he qualified under it

or not there's still work there.

(Tr.p. 92, lines 16 through p. 93, line 5)

It was error to exclude this evidence on the basis of relevance. Pursuant to Rule 401 of the Utah Rules of Evidence, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The issue of whether or not Mr. Coelho was voluntarily underemployed was of serious consequence to Mrs. Coelho as it affected the financial support awarded by the court and the allocation of debt. Given the fact that Mr. Coelho was in the construction business, evidence that work was available made it more probable that he was voluntarily unemployed. It was therefore relevant and its exclusion was prejudicial error.

In addition, the offer of the evidence was in the nature of a request for the court to take judicial notice of public records. Pursuant to Rule 201 of the Utah Rules of Evidence, it is the duty of the court to take judicial notice of adjudicative facts. Under that rule, "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." It is mandatory for the court to take judicial notice "if requested by a party and supplied with the necessary information."

The documents that Mrs. Coelho's counsel wanted to admit were public records and therefore their accuracy could not reasonably be questioned. Because of Mr. Coelho's claim that work was unavailable, the evidence was relevant. The weight the court desired to give to that evidence was within its discretion, but refusing to admit it was prejudicial error because the court subsequently accepted Mr. Coelho's proffer as to earnings and speculated that his income for 1993 would be less than 1992. There was no basis, either in the transcript or the record, on which to justify such speculation. In contrast, the evidence offered would have contradicted Mr. Coelho's position that he was underemployed because there was no work available.

In addition to the court's failure to admit relevant evidence, the court expressly refused to review evidence that had been admitted. Mrs. Coelho's counsel offered copies of the parties' tax returns and other financial documentation which were admitted into evidence. (See Exhibits 2 through 10 and Exhibit 16) At the close of Mr. Coelho's case, his counsel advised the court that he would agree to waive closing argument if Mrs. Coelho's counsel would as well. Her counsel indicated that she would do so because she thought the "paper work," referring to the tax returns and other exhibits she had submitted, would "help [the court] out," and the court responded:

Well, I'm prepared to rule right now. I don't think you can expect that I am going to go through the backup documents and the checks and the tax returns and the other documents.

(Tr.p. 128, lines 13-16)

It is the duty of the court to listen to the testimony of witnesses, to review the documentary evidence admitted, and to render a decision after its consideration of all of the evidence and testimony adduced at trial. Any other procedure, even in the interests of time, is arbitrary, without support in fact or law, and an abuse of discretion. The findings relating to Mr. Coelho's income are not supported by the evidence, and this case should be remanded for a new trial and an adequate consideration of the evidence.

POINT III

THE COURT'S FINDINGS WITH RESPECT TO THE PARTIES' GROSS MONTHLY INCOMES TO THE PLAINTIFF WERE CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE EVIDENCE AND RESULTED IN AN INADEQUATE AWARD OF FINANCIAL SUPPORT

Despite the fact that the uncontroverted evidence at trial established that Mrs. Coehlo's monthly net income averaged \$1,121.54 and her monthly expenses were \$3,560.00, and despite the fact that, since 1989, Mr. Coehlo's earnings averaged \$6,597.92 per month, the court only awarded Mrs. Coehlo alimony in the amount of \$1,000 per month for one year and child support in the amount of \$619 per month. The court's findings as to the income of the parties, the awards of child support and alimony are as follows:

8. Income Determination. The court heard testimony from plaintiff concerning her income history and capacity to earn income, testimony from two accountants concerning the parties' historical income and defendant's income for 1992, a proffer concerning defendant's current earning capacity, and copies of the parties' tax returns for the past ten years together with

summaries. The court having reviewed and considered all the evidence, finds that based upon the current circumstances defendant has an earning capacity of \$5,000 per month and plaintiff has an earning capacity of \$1,500 per month, and the court's findings related to support and alimony are based upon these income expectancies.

Specifically, the court finds that defendant is a small independent contractor who has had good years and bad years. It appears that 1992 was a good year but the income related primarily to one project, and it further appears that defendant earned most of the 1992 income during the first part of the year, with very little income for the last part of the year and with no income for the first month of 1993. It is because of these circumstances that the court finds the expectancy for 1993 of defendant's income is the amount of \$5,000 per month.

Specifically, the court finds that plaintiff is currently working at employment as a ski instructor and working with disabled children, earning an income substantially below what she has historically earned when she was active as a real estate person during the 1985, 1986, 1987 and 1988 years, as reflected in plaintiff's own Exhibit 11. It is anticipated that plaintiff should be able to become more gainfully employed and after a short period of time earn an income sufficient to meet her own needs based upon her demonstrated ability.

9. Child Support. Consistent with the Child Support Guidelines of the State of Utah, the income determinations set forth in paragraph 8, and the custody arrangement between the parties as set forth in paragraph 4 above, defendant should pay to plaintiff as child support the sum of \$619 per month, commencing with the month of February, 1993, as shown on the Child Support Worksheet attached hereto as Exhibit "A". As a further obligation of support, defendant should be responsible to maintain the children on his currently-held health and accident insurance which has a \$500 deductible and each of the parties should be responsible for one-half of all non-insured medical expenses incurred by any of the three children.

Defendant should have the further obligation to pay to plaintiff one-half of any child care costs which she incurs which are work related. Plaintiff shall provide to defendant an accounting at the end of the month of the time and cost of child care. Defendant

should then pay to plaintiff one-half of said amount within ten days of receipt of the accounting.

The court finds that Tony is currently in need of therapy, and to the extent that expenses are incurred for necessary therapy as that necessity is indicated by his therapist, the cost of this therapy should be paid 70% by defendant and 30% by plaintiff. This proration is roughly equatable to the proration of income between the parties and, further, takes into consideration the fact that plaintiff should have some substantial responsibility for the cost of therapy as she has control of determining how often therapy is received.

The parties have stipulated that Sara should be seen by a mutually-acceptable therapist on the basis of once a month and in the event of any opinion of the therapist that more therapy is required, then as often as necessary, with each of the parties to be responsible for one-half of the therapy. The choice of a mutually-acceptable therapist for Sara should be determined by the parties in consultation with Dr. Sam Goldstein. Any therapy for Sara with Michelle Miller should be paid by defendant. The division of this cost equally between the parties is different than the division related to Tony's therapy for the reason that defendant shall be responsible for all of the costs of Michelle Miller, who is the current therapist for Sara.

Any obligation for payment of support or medical or therapy expenses shall continue so long as the children are minors and thereafter to high school graduation for any child who turns 18 prior to graduation.

11. Alimony. Based upon the findings which the court has previously set forth above and based upon the living expenses of the parties as set forth in their respective exhibits, defendant should pay to plaintiff as alimony the sum of \$1,000 a month commencing with the month of February, 1993, and continuing for a period of one year to allow plaintiff the opportunity to reestablish her income based upon her demonstrated historical earning capacity. At that time, plaintiff should have the right to petition the court for a reevaluation to determine whether alimony should be terminated at that time or extended based upon the circumstances then existing.

These findings are clearly erroneous because they are not supported by the evidence at trial. The financial support awarded to the Plaintiff, based on these findings, was an abuse of discretion.

A. Financial Circumstances

The evidence at trial established that Mrs. Coelho was working two jobs, one as a ski instructor which was seasonal and another as a trainer working with handicapped adults. In addition, she was also attending school full-time. Her average net monthly income was \$1,121.54. Mrs. Coelho also testified that she had worked as a real estate agent and that during 1985 she had made a very large commission from one sale. Excluding that year, Mrs. Coelho averaged approximately \$25,000 per year of net income (after necessary business expenses) from her real estate earnings which included a \$10,000 annual payment for two (2) years that was deferred from the very same sale. From 1989 through 1991, her net income from real estate earnings averaged less than \$3,000 per year, and she did not work in real estate after 1991. She also testified that she was no longer licensed as a real estate agent, and estimated that it would take her the average length of time, about five years, to build up a clientele. She also testified that the parties' handicapped son, Tony, demanded much of her time and attention, thereby making a reentry into the real estate profession impractical. In fact, the court had previously awarded Mr. Coelho \$2,600 per month as combined temporary support. (R. 43-51)

Despite all of this evidence, the court concluded that she could earn \$1,500 per month and admonished her to "maximize" her earning potential. The court purported to rely on the fact that she had in the past, and specifically that one year in which she earned the large commission, demonstrated an ability to earn sufficiently more than she was making at the time of trial.

Contrary to the court's use of years and years of historical earnings to artificially increase Mrs. Coelho's earnings, or at least her earning ability, the court refused to consider Mr. Coelho's historical earnings, even for the three years prior to trial. Instead, the court imputed income to him based only on his counsel's proffer that he did not expect to earn more than \$60,000 during 1993. This was simply speculation and not based on any hard evidence heard at trial. Instead, the evidence at trial clearly established that Mr. Coelho was self-employed as a construction contractor, and since 1989 his income, after necessary and discretionary business expenses, averaged \$6,594.92 per month. His average monthly earnings for 1992, the year that ended less than two months before the time of trial were \$7,281.17.

Because her husband's earnings fluctuated over the course of the year, with some months being very good and others less so, it was Mrs. Coelho's position at trial that it would be fair to average his earnings. She requested the court to find that Mr. Coelho's gross monthly income was \$6,500, even less than the monthly average for 1992, and to base its support awards on that

amount. The evidence supporting Mrs. Coelho's position included the parties' tax returns and evidence of Mr. Coelho's historical earnings was undisputed at trial. Despite the undisputed evidence, however, the court chose to arbitrarily set Mr. Coelho's income at the speculative amount of \$5,000, based only on the proffer of his counsel. The court's determinations were clearly erroneous, not based on law or fact, and unsupported by the evidence. Because of their adverse impact on both the child support and alimony amounts awarded to Mrs. Coelho, the findings should be vacated and this case remanded to the trial court for a determination of appropriate findings on which to base an adequate award of child support and alimony.

B. Child Support

Under Utah Code Ann., § 78-45-7.5(5) (Supp. 1993), the trial courts are required to verify the incomes of the parties to calculate child support. In pertinent part, this section states:

(b) Each parent shall provide suitable documentation of current earnings, including year-to-date pay stubs or employer statements. Each parent shall supplement documentation of current earnings with copies of tax returns from at least the most recent year to provide verification of earnings over time and shall document income from nonearned sources according to the source.

(c) Historical and current earnings shall be used to determine whether an underemployment or over employment situation exists.

(Emphasis added.)

This section clearly requires the court to base its award of support on the current earnings of the parties. If current

earnings cannot be determined, or if the court finds that a situation of underemployment or overemployment exists, then and only then can it review the historical earnings of the parties.

Applying these provisions to the facts of this case, there is no finding that Mr. Coehlo was overemployed or that Mr. Coehlo was underemployed. In fact evidence would simply not support such findings. Instead, the evidence before the court clearly establishes that Mrs. Coehlo's current gross monthly income was \$1,121.45, and Mr. Coelho's average net monthly for 1992, based his net gross of \$95,346, (after reduction for necessary and discretionary business expenses), was \$7,945.50. Based on these incomes, the court was compelled by statute to award Mrs. Coelho child support in the sum of \$937. The court's failure to do so was clearly erroneous. This court should either enter its own order of child support, retroactive to time of trial, or remand the case to the trial court for a determination consistent with this court's ruling.

In addition, the erroneous findings resulted in an inequitable division of responsibility for extraordinary expenses incurred for the parties' son, Tony. This court should enter its order requiring the parties to be responsible for a proportionate share of Tony's expenses after an appropriate determination of the parties' incomes.

C. Alimony

The same error that skewed the child support calculations also adversely affected the amount of the alimony awarded to Mrs. Coelho. Based on the court's analysis of the incomes of the parties, and its speculation as to her future earnings, it only awarded Mrs. Coelho alimony in the amount of \$1,000 per month for a period of one year. This was clearly an abuse of the court's discretion and not based on the evidence adduced at trial.

The factors the court should have considered when making an award of alimony are well-settled in Utah law. In awarding alimony the court was required to consider:

1. The financial condition and needs of the party seeking alimony;
2. That party's ability to produce sufficient income for him or herself; and
3. The ability of the other party to provide support.

See Munns v. Munns, 790 P.2d 116, 121 (Utah App. 1990); Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah Ct. App. 1988); Watson v. Watson, 194 Utah Adv. Rep. 42, 43 (1992).

This court has also held that the "[f]ailure to analyze the parties' circumstances in the light of these three factors constitutes an abuse of discretion." Naranjo v. Naranjo, 751 P.2d at 1147 (Utah App. 1988).

Applying these factors to the case on appeal, the court clearly abused its discretion in fashioning a support award for Mrs. Coelho. First of all, evidence at trial established that Mrs. Coelho's monthly living expenses were \$3,560.00 (see Exhibit 14)

and her average monthly net income was \$1,121.45. There was no evidence introduced at trial to contradict these expenses. There are only two references to Mrs. Coelho's needs in the Findings of Fact. In Paragraph 8, the court finds that Mrs. Coelho should "...after a short period of time earn an income sufficient to meet her own needs based upon her demonstrated ability." In Paragraph 11, the court accepts the living expenses of the parties as "set forth in their respective exhibits." Based on Mrs. Coelho's income at time of trial, Exhibit 15 illustrates the monthly shortfall she experiences between those expenses and her income, the amount of \$2,438.46. It is simply inconceivable that Mrs. Coelho could meet this shortfall, even with increased child support, without a sufficient alimony award.

The second factor the court must consider in making a determination of an award of alimony is the ability of a receiving spouse to produce a sufficient income for herself. It was undisputed at trial that Mrs. Coelho was earning an average net income of \$1,121.45 per month working two jobs. Although Mrs. Coelho testified that she left the real estate business because of the increased needs of her family and specifically the needs of her children, the court improperly speculated that she could "maximize" her earnings and imputed income to her that she did not earn in analyzing her ability to produce income. In its findings the court stated:

The court finds that [Mrs. Coelho] is currently working at employment as a [ski] instructor and

working with disabled children, earning an income substantially below what she has historically earned when she was active as a real estate sales person during the 1985, 1986, 1987 and 1988 years, as reflected in plaintiff's own Exhibit 11. It is anticipated that [Mrs. Coelho] should be able to become more gainfully employed and after a short period of time earn an income sufficient to meet her own needs based upon her demonstrated ability.

(Finding No. 8; R.340; emphasis added)

Even in the court's own finding, it acknowledges that Mrs. Coelho's real estate earning history ended in 1988, five years before the trial. Therefore, it was error for the court to even consider it in determining Mrs. Coelho's ability to provide for her own financial needs. However, even if she did have the ability to earn income at the court's level of \$1,500 per month, it is clear that she cannot maintain herself and the children in the standard of living to which the family became accustomed during the marriage without an appropriate amount of alimony in excess of that awarded by the court.

Finally, the court must consider the ability of the defendant, Mr. Coelho, to pay alimony. In this regard, the court erred in two respects. First of all, the court erred in disregarding his actual earnings to reach its determination that his average monthly income was \$5,000. Instead, evidence at trial established that he had net earnings of \$95,346 in 1992. The only evidence at trial as to Mr. Coelho's future earnings was the proffer made by Mr. Coelho's counsel that he "expected" to earn no more than \$60,000 in 1993. Again, by accepting this proffer despite substantial evidence to

the contrary, the court gave Mr. Coelho the advantage of reaching into the future to reduce his average earnings. At the same time, the court put Mrs. Coelho at a disadvantage by using income figures from as far back as 1985 to artificially increase her expected earnings.

Second, the court erred by accepting Mr. Coelho's monthly living expenses as listed on his Exhibit 25. Several of his expenses are excessive almost as a matter of law. Unfortunately, Mrs. Coelho's counsel was not given the time to cross examine Mr. Coelho to ask him about the furniture replacement expense (\$400.00), the professional services expense (\$500.00), and his entertainment expense (\$400.00), or to cross examine him as to whether many of those expenses, e.g., automobile, health insurance, and entertainment, were paid by his business before he received his net earnings. The tax returns, and specifically Schedule C of the returns, would so indicate. Throughout the trial Mrs. Coelho's counsel had been cautioned to be brief, to hurry through her client's case, and her inability to cross examine Mr. Coelho was no exception, as is illustrated by the following exchange that took place between the court and counsel:

Ms. Saunders: And the other thing I didn't get to talk to Mr. Coelho about and I would have asked on cross-examination is why, why for one man [are] his monthly expenses \$3,900 a month and my client's [are] \$400.00 less a month and she had the three children, the mortgage payment and herself to support. That's outrageous. I mean, if he is paying \$4,000 a month for one person, for himself, that's a

high standard of living when three children, a house and a mother are less.

Mr. Dart: I can [respond] to everything that's been said if the court's interested in hearing it.

Judge Young: Yes, but the problem I have, obviously, is pressure on time, and I need to both be sensitive to your opportunities to be adequately heard and also to the pressures that I have in terms of commitment to the judicial council.

It is clear that Mr. Coelho's expenses, particularly when compared to his wife's expenses for herself and two children, were excessive and not representative of his actual expenses. Instead, it is clear from the evidence at trial that Mr. Coelho had the ability to pay alimony in an amount that would provide Mrs. Coelho and the children a standard of living comparable to his own. Under these circumstances, it was an abuse of discretion to award Mrs. Coelho alimony of only \$1,000.00 per month.

Finally, the court clearly erred as a matter of law by limiting the award of alimony to a period of one year. The parties were married for sixteen years. Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, an alimony award is made to insure that the supported spouse may maintain a standard of living that would have been enjoyed had the marriage continued. (See Naranjo, at 1147; See also Rasband v. Rasband, 752 P.2d 1131, 1134 (Utah App. 1988). There are neither such findings in this case nor any evidence which would support such findings. Clearly, Mrs. Coelho will be unable

to sustain the standard of living enjoyed during the marriage with the inadequate and limited alimony awarded by the trial court.

The parties' historical abilities and present abilities to earn income were significantly and substantially disparate. The evidence of Mrs. Coelho's needs was undisputed. It was clear that she could not meet those needs without substantial financial support from Mr. Coelho. Finally, it was clear from the evidence that Mr. Coelho had an ability to provide sufficient support.

Based on the evidence in the record, this court should reverse the lower court's award of alimony and enter its own order awarding Mrs. Coelho alimony, retroactive to the date of trial, in the amount she requested of \$2,500 per month (Tr.p. 21, lines 22-23), which should continue until she remarries, cohabits, or dies, whichever shall first occur. In the alternative, the case should be remanded for an appropriate determination of alimony.

POINT IV

THE COURT ABUSED ITS DISCRETION BY ORDERING PLAINTIFF
TO PAY ONE-HALF OF THE TOTAL EQUITY LINE MORTGAGE
AND ONE-HALF OF THE TAX OBLIGATION OWING TO THE IRS

In the Decree of Divorce, the court ordered Mrs. Coelho to pay one-half of the total equity line second mortgage owing on the parties' residence in the amount of \$34,400, despite the fact that approximately \$7,000 of the balance owing was used by Mr. Coelho to pay his temporary support obligations. Finally, the court ordered Mrs. Coelho to pay one-half of the parties' tax obligation to the IRS on the basis that they had both derived a benefit from the

money during the marriage, despite the fact that the parties had not lived together during the entire year. Mr. Coehlo's ability to pay that tax was substantially better than Mrs. Coehlo's, and his income comprised a much greater percentage of the whole income upon which taxes were due.

The findings in support of the court's decisions state, in pertinent part, as follows:

5. Real Property. The house and real property located at 5328 Old Ranch Road, Park City, Utah, should be listed for sale with a real estate agent mutually acceptable to the parties, and a listing price to be arrived at between the parties in consultation with said real estate agent. Upon the sale of said house and real property, and after payment of the first mortgage obligation to Valley National Mortgage Co. which has a current balance of \$137,000, the second mortgage line-of-credit to Valley Bank which [has] a current balance of \$34,400, expenses of sale and any out-of-pocket expenses of either party necessary to place the home in marketable condition, and any moving expenses of plaintiff up to the amount of \$5,000, any remaining equity should be divided equally between the parties....

. . . .

7. Debts and Obligations. The liabilities of the parties should be assumed and paid as follows:

(a) The first and second mortgages on the home at 5328 Old Ranch Road, Park City, should be assumed and paid as set forth in Paragraph 5 above.

(b) The 1992 income tax liability of the parties should be divided equally between the parties, and the

parties should cooperate with their accountant, E.J. Passey, in the preparation of income tax returns either jointly or separately which will provide the lowest total tax liability. Defendant should be responsible for and pay for the cost of this tax preparation.

(R. 335-340)

While the trial court is given broad discretion to allocate responsibility for marital debt between the parties, (see Sinclair v. Sinclair, 718 P.2d 396 (Utah 1986)), the court abused its discretion in this case. On or about October 15, 1991, the court entered its temporary order awarding Mrs. Coelho "family support" in the amount of \$2,600 per month. (R. 49) Approximately one year later, on or about November 20, 1992, the Defendant made a motion to be allowed to use the credit line second mortgage to satisfy this support obligation. (R. 115) The basis for his motion was his claim that he had finished the construction projects upon which the temporary order was based and anticipated having no employment until the spring. (R 117-119)

Mrs. Coelho objected, citing her argument that Mr. Coelho was voluntarily and intentionally underemployed. To support her position, she relied on the tax returns of the parties, amounts in Mr. Coelho's bank accounts, his historical employment history, work available in Park City and the numerous hunting trips Mr. Coelho had recently taken out of state. (R. 129-139) The court granted the motion, reserving the issue of responsibility to pay back the amounts incurred until time of trial (R. 273 and 281-282).

After ruling on the primary issues on the date of trial, the court asked counsel if there were "anything else unresolved," (T. 140, l. 25) and counsel and the court subsequently had the following exchange:

Ms. Saunders: The second mortgage, the line of credit, we had not discussed.

Judge Young: That's considered by the court to be a marital [debt] and that's considered to be the joint responsibility of the parties. So what'll happen is that'll simply be paid off out of the proceeds of the sale of the home.

Ms. Saunders: What if the house isn't sold?

Judge Young: Then it remains as an expense against the mortgage. Against the property. It is a marital expense. In other words, they can resolve how they are going to deal with that marital expense, but it is a joint marital expense and it goes against the asset value.

Ms. Saunders: Even if part of it was used to pay the alimony?

Judge Young: It was used to pay alimony because of the loss of income.

Mr. Dart: Finally, there is an issue, I suppose, at least I've heard it, that the 1992 tax liability, whatever it is, is going to be for \$15,000.00, \$20,000.00. Our position is it is marital and should be divided.

Judge Young: It is a marital expense and it should be divided.

(T. 141, lines 1-25)

The court was required to make specific findings to support its determination allocating these obligations equally between the parties. In neither the transcript of the trial nor the findings

subsequently entered by the court is there any specific explanation as to why the court ruled as it did. Instead, the court simply and arbitrarily concluded that the credit line expense and the tax debt were marital expenses.

Based on his proffer at trial and based on the evidence submitted to the court, Mr. Coelho clearly has the greater ability to pay the credit line expense and tax debt.

To begin first with the credit line expense, Mr. Coelho should have been required to pay back the \$7,000 used by him because the weight of evidence established that he was intentionally unemployed in anticipation of trial. Clearly, a man who averaged \$6,500 per month since 1989 would not be totally without work or funds to meet his obligations. At the very least, the court should have accepted evidence on this issue.

This court should remand this case for a new trial with instructions as to the appropriate division of this debt after a determination as to whether Mr. Coelho was voluntary and intentionally under employed.

Second, the court abused its discretion by ordering each party to pay one half of the 1992 tax debt. The parties separated in the Fall of 1991 and lived apart during the entire 1992 tax year. Contrary to the general premise that both parties benefitted from the monies not paid for taxes, Mrs. Coelho received only the temporary support amount Mr. Coelho was ordered to pay during the entire year. Therefore, regardless of whether Mr. Coelho paid his

taxes or whether he used the money for other expenditures, Mrs. Coelho did not benefit from that decision. The court's ruling, in fact, penalized her, making her responsible where she had no input in the decision not to pay taxes and where that money had been available only to Mr. Coelho to meet his obligations.

Instead, the evidence is clear that Mr. Coelho had the much greater financial ability to pay the taxes and at the very least the court should have apportioned responsibility for the debt based on each party's proportionate share of the income earned. Splitting responsibility for the debt was an abuse of discretion and Mr. Coelho should be ordered by this court to pay in full the IRS obligation or at least the greater proportionate share of it.

POINT V

THE COURT ABUSED ITS DISCRETION IN ONLY AWARDING MRS. COELHO \$3,000 IN ATTORNEY'S FEES AND IN FAILING TO MAKE THE REQUISITE FINDINGS UPON WHICH TO BASE AN AWARD.

Trial courts have the power to award attorney's fees in divorce proceedings pursuant to Utah Code Ann. § 30-3-3 (Supp. 1993). While the decision to make an award and the amount of the award are within the sound discretion of the trial court, an award of attorney's fees must be based upon the need of the receiving spouse, the ability of the paying spouse to pay such fees and the reasonableness of the fees. An award of attorney's fees must be supported by adequate findings. As outlined in the case of Bell v. Bell, 810 P.2d 494 (Utah App. 1991):

A trial court has the power to award attorney's fees in divorce proceedings, pursuant to Utah Code Ann. § 30-3-3 (1989). The award must be based upon evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. The decision to make such an award and the amount thereof rests primarily in the sound discretion of the trial court. A court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of hours spent on the case, the fees customarily charged in the locality, the amount involved in the case and the result obtained, and the expertise and experience of the attorneys involved.

Id at 493.

In the Bell case, the Plaintiff presented evidence that her reasonable attorney's fees were \$2,350, and the Defendant did not challenge the reasonableness of the fees. Even so, the trial court awarded the plaintiff only \$800 and made no findings relating to the three factors or any explanation for awarding only one-third of the requested fees. This court remanded the case to the trial court for a redetermination of attorney's fees and findings to support an award. In so doing, this court relied on Haumont v. Haumont, 793 P.2d 421 (Utah App. 1990) in which this court held that it was an abuse of discretion for a trial court to award less than the amount of attorney's fees claimed absent a reasonable justification. (See 810 P.2d at 494)

These principles are directly applicable to the attorney's fees awarded the Plaintiff in this case. At the time of trial, counsel for the Plaintiff proffered testimony relating to the attorney's fees incurred by the Plaintiff as well as submitting an affidavit. (See Plaintiff's Exhibit 19.) To begin with, the

parties stipulated that the fees charged by the Plaintiff's prior attorney, Mary Corporon, in the amount of \$946.57 were reasonable. (Tr.p. 90 lines 11-15) After that stipulation was submitted to the court, Evelyn Saunders testified that her fees, which she believed were reasonable, totalled \$9,164, not including amounts incurred on the date of trial. (Tr.p. 90, line 21 through p. 92 and line 6; Plaintiff's Exhibit 19)

Despite the fact that this evidence was uncontested and despite the fact that the defendant did not object to the reasonableness of the fees or deny his ability to pay, the trial court simply ruled "now, as to attorney's fees, he is to pay \$3,000 of her attorney's fees and otherwise each is to bear their own." (Tr.p. 140, lines 5-7) The only finding which supports this award is finding number 13. It states:

13. Attorney's Fees and Costs. Plaintiff proffered evidence of attorney's fees which she had incurred with her prior attorney Mary Corporon and with her present attorney Evelyn R. Saunders and the court having considered the reasonableness of the fees and the relative ability of the parties to meet the cost of attorney's fees and taking into consideration that the Defendant shall be responsible for all of his own fees, finds that it is reasonable that Defendant should be responsible for payment of \$3,000 to Plaintiff for her attorney's fees and costs incurred in this action, which amount should be paid within 120 days from the 11th day of February, 1993 or upon sale of the house and real property of the parties, whichever occurs first.

This finding is insufficient to satisfy the requirements outlined by this court. Specifically, the trial court failed to make a finding as to the Plaintiff's need for payment of her fees and the Defendant's ability to pay those fees. As argued above, the

incomes of the parties' incomes were greatly disparate, and the only justification for reducing the attorney's fees from the amount requested was the statement that the Defendant would be responsible for all of his own attorney's fees. However, the court made absolutely no finding nor is there any evidence in the record as to the Defendant's fees and costs incurred in this matter.

Because the amount and reasonableness of the fees claimed by Mrs. Coelho were undisputed and because there was no evidence before the court which would support any reasonable justification for the court's decision to award Mrs. Coelho less than all of her fees claimed, the award of attorney's fees and costs to Mrs. Coelho clearly was an abuse of discretion. This case should be remanded to the trial court with instructions to make findings with respect to Mrs. Coelho's financial need for her attorney's fees, Mr. Coelho's ability to pay her fees, and the reasonableness of the fees incurred. In addition, if Mrs. Coelho is awarded less than her undisputed claim for fees, additional findings must be made as to a reasonable justification for that award.

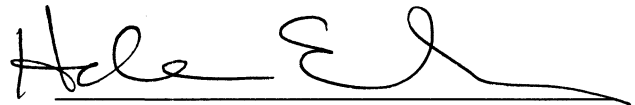
CONCLUSION

The court's arbitrary imposition of time limits prevented Mrs. Coelho from having her day in court. As a consequence, relevant evidence was excluded and the court's summary consideration of the evidence admitted resulted in findings that are clearly erroneous. Based on those findings, the court abused its discretion in fashioning alimony and child support awards, in allocating debt and

in awarding attorneys fees. Where the evidence is clear, this court should simply enter its own orders consistent with the actual circumstances of the parties at the time of trial. As to the remaining issues, this case should be remanded to afford Mrs. Coelho the opportunity to fully present her case and for an appropriate determination of the facts.

RESPECTFULLY SUBMITTED this 12th day of November, 1993.

GUSTIN & CHRISTIAN

A handwritten signature in black ink, appearing to read "Helen E. Christian", written over a horizontal line.

HELEN E. CHRISTIAN
Attorneys for
Plaintiff/Appellant.

CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the above and foregoing BRIEF OF APPELLANT were duly hand delivered, addressed to:

B. L. Dart, Esq.
DART, ADAMSON & DONOVAN
310 South Main Street, Suite 1330
Salt Lake City, UT 84101

DATED this 12th day of November, 1993.



HELEN E. CHRISTIAN

ADDENDUM

INDEX TO ADDENDUM

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Minute Entry dated April 29, 1993	B-19

ADDENDUM A

30-3-1. Procedure — Residence — Grounds.

NOTES TO DECISIONS

ANALYSIS

ANALYSIS

Irreconcilable differences.
Jurisdiction, district courts.

Irreconcilable differences.

Because Subsection (3)(h) does not set forth a specific fault of the defendant, in contrast to the other subsections, it can be inferred that Subsection (3)(h), unlike the other provisions, is intended to be a no-fault provision. There-

fore, no fault need be proven to apply Subsection (3)(h). *Haumont v. Haumont*, 793 P.2d 421 (Utah Ct. App. 1990).

Jurisdiction, district courts.

When purported marriage is void ab initio under § 30-1-2, a trial court lacks subject matter jurisdiction to enter a divorce decree. *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Brigham Young Law Review. — No-Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. Rev. 79.

A.L.R. — Insanity as defense to divorce or separation suit — post-1950 cases, 67 A.L.R.4th 277.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

History: C. 1953, 30-3-3, enacted by L. 1993, ch. 137, § 1.

Repeals and Reenactments. — Laws 1993, ch. 72, § 10 repeals former § 30-3-3, Utah Code Annotated 1953, allowing a court to order

either party to pay for the separate support and maintenance of the adverse party and the children, and enacts the present section, effective May 3, 1993.

Attorney fees.

—Need.

—Determination.

Attorney fees for appeal.
Discretion of trial court.

Attorney fees.

In accord with last paragraph. See *Morgan v. Morgan*, 770 P.2d 156 (Utah Ct. App. 1990).

Attorney fees may be awarded for the support and maintenance, including actions for the modification of custody. The decision to award attorney fees within the trial court's discretion. *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1990).

Either party to a divorce action may be ordered to pay the adverse party's attorney fees. This includes attorney fees incurred on appeal. *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1990).

In order to award attorney fees, the trial court must find the requesting party's financial assistance and the requested fees are reasonable. *Rich v. Rich*, 788 P.2d 1057 (Utah Ct. App. 1990); *Bagshaw v. Bagshaw*, 788 P.2d 1057 (Utah Ct. App. 1990); *Haumont v. Haumont*, 793 P.2d 421 (Utah Ct. App. 1990); *Walters v. Walters*, 815 P.2d 1335 (Utah Ct. App. 1991).

—Need.

Trial court did not abuse its discretion in ordering each party to pay his or her attorney fees, where neither party was able to pay the other's attorney fees. *Munns v. Munns*, 790 P.2d 156 (Utah Ct. App. 1990).

Wife who did not prevail on appeal was not entitled to attorney fees on appeal. *Haumont v. Haumont*, 793 P.2d 421 (Utah Ct. App. 1990).

An award of attorney fees requires evidence of the financial need of the party, the ability of the other party to pay, and the reasonableness of the fees. *Bell v. Bell*, 810 P.2d 489 (Utah Ct. App. 1991).

Since the trial court, in awarding attorney fees, did not address the reasonableness of the fees, it was reversible error.

A.L.R. — Death of obligor obligee's right to alimony, 79 A.L.R.4th 10.

78-45-7.4. Obligation — Adjusted gross income used.

Adjusted gross income shall be used in calculating each parent's share of the child support award. Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines.

History: C. 1953, 78-45-7.4, enacted by L. 1989, ch. 214, § 6. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 1989, ch. 214 be-

78-45-7.5. Determination of gross income — Imputed income.

(1) As used in the guidelines "gross income" includes:

(a) prospective income from any source, including nonearned sources, except under Subsection (3); and

(b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time job.

(3) Specifically excluded from gross income are:

(a) Aid to Families with Dependent Children (AFDC);

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, S.S.I., Medicaid, Food Stamps, or General Assistance; and

(c) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide suitable documentation of current earnings, including year-to-date pay stubs or employer statements. Each parent shall supplement documentation of current earnings with copies of tax returns from at least the most recent year to provide verification of earnings over time and shall document income from nonearned sources according to the source. Verification of income from records maintained by the Office of Employment Security may be substituted for employer statements and income tax returns.

- (c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.
- (6) Gross income includes income imputed to the parent under Subsection (7).
- (7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.
- (b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.
- (c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.
- (d) Income may not be imputed if any of the following conditions exist:
- (i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;
 - (ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;
 - (iii) a parent is engaged in career or occupational training to establish basic job skills; or
 - (iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.
- (8) (a) Gross income may not include the earnings of a child who is the subject of a child support award, nor benefits to a child in the child's own right, such as Supplemental Security Income.
- (b) Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

History: C. 1953, 78-45-7.5, enacted by L. 1989, ch. 214, § 7; 1990, ch. 100, § 5.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, added the last sentence in Subsection (5)(b), in Subsection (7)(b) substituted "If income is imputed to a

parent, the income shall be based" for "Income shall be imputed to a parent based," and made a stylistic change in Subsection (7)(c).

Effective Dates. — Laws 1989, Chapter 214 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

NOTES TO DECISIONS

ANALYSIS

Modification of award.
Cited.

Modification of award.

When the parties had agreed to the amount of child support before the effective date of the child support guidelines, the trial court erred in modifying child support when no petition to modify had been filed and in modifying the

support amount without finding that a material change of circumstances had occurred since the previous order had been entered. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990) (applying § 78-45-7.2(1)(b) prior to 1990 amendment regarding impact of guidelines on existing support orders).

Cited in *Thronson v. Thronson*, 810 P.2d 428 (Utah Ct. App. 1991).

ADDENDUM B

No.

FILED

APR 29 1993

Clerk of Summit County

By Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

MARY COELHO,

Plaintiff,

vs.

MINUTE ENTRY
RULING 4-501 UCJA

ALCIDES J. COELHO,

Defendant.

CASE # 91-11093

The Court has reviewed the Objections of the plaintiff and the Reply of the Defendant. The Court denies the Objections and approves and enters this date the Findings and Decree as submitted.

Further the Court states that within the plaintiff's Objections there is language expressing concern as to the "limited time" allowed for the hearing. The Defendant's response in part suggests that the Objections of the Plaintiff are designed, in part, to increase the "vulnerability" of the Court's decision on appeal. The Court states that it too felt concern as to the "time" available for trial. The day happened to be a day on which the Chief Justice called a special meeting of the Judicial Council of which the undersigned is a member. As it turned out, I was one and one-half hours late for the meeting.

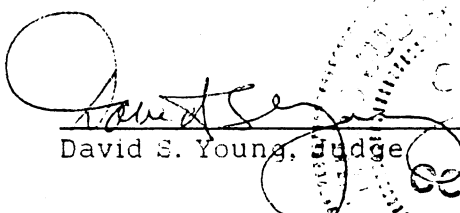
In order to consider the magnitude of the concern, the Court invites a Motion for a New Trial to be filed and argued if that remains a concern. The court notes that there was no timely objection to the procedure on the day of the trial but nevertheless would like to consider the present concerns of the parties as to the adequacy of their presentations. Neither party should presume as to the Court's present view in considering a New Trial. The present concern of the Court

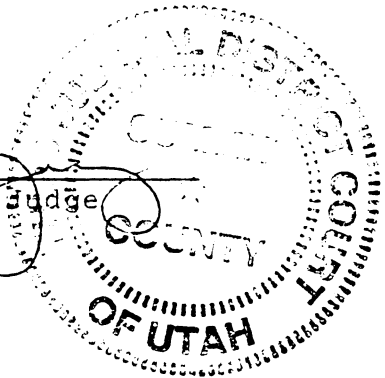
is to determine if either party believes they did not have a adequate opportunity to present their case and each should state what they would request, if anything, to be further presented to the court.

Dated, April 29, 1993.

C.C. to counsel

↓
4-30-93


David S. Young, Judge



B. L. DART (818)
DART, ADAMSON & DONOVAN
Attorneys for Defendant
310 South Main, Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

No.

FILED

APR 29 1993

Clerk of Summit County

By Deputy Clerk

IN THE DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

---oooOooo---

MARY COELHO,	:	
	:	
Plaintiff,	:	FINDINGS OF FACT
	:	AND CONCLUSIONS OF LAW
v.	:	
	:	
ALCIDES J. COELHO,	:	Case No. 11093
	:	
Defendant.	:	Judge Young

---oooOooo---

The above-entitled matter came on regularly for trial on Thursday, the 11th day of February, 1993, at the hour of 9:00 a.m., plaintiff appearing in person and by her attorney Evelyn R. Saunders, and defendant appearing in person and by his attorney B. L. Dart, and plaintiff having testified and two accountants having testified and defendant's testimony having been proffered and other matters were submitted by proffer and the Court having received exhibits and the matter having been submitted and the Court being fully advised, hereby makes the following:

FINDINGS OF FACT

1. Plaintiff and defendant were married in Park City, Utah on the 16th day of July, 1977, and since that time have been husband and wife.

2. Plaintiff and defendant are both residents of Summit County, State of Utah, and have been for more than three months immediately prior to the filing of this action for divorce.

3. Grounds. Differences have arisen between the parties which have made it impossible for them to continue with this marriage relationship. The parties have been separated since October, 1991, and the Court finds that grounds exist for entry of a Decree of Divorce on the grounds of irreconcilable differences.

4. Custody and Visitation. Three children have been born as issue of this marriage: Sara, born August 7, 1978, who is 14 years of age; Tony, born August 19, 1980, who is 12 years of age; and Emily, born September 29, 1985, who is six years of age. Pursuant to stipulation of the parties and consistent with the child custody evaluation filed in this action, plaintiff should be awarded the care, custody and control of Emily and Tony, subject to defendant's reasonable rights of visitation, which should be as follows:

a. The right to have these two younger children, each Monday evening from 5:00 p.m. to 8 p.m. for CCD and so long as they are attending CCD.

b. The right to have the two younger children each Wednesday evening from 5:00 p.m. until Thursday morning and then take them to school.

c. The right to have the two younger children each Saturday evening from 6:00 p.m. to Sunday at 6:00 p.m.

d. The right to have all three children each Christmas Day from 9:00 a.m. to 6:00 p.m.

e. All other major holidays to be alternated between the parties.

f. During the summer school vacation period, the visitation schedule should change to alternating weekends and be adjusted so that all three children are together each weekend.

g. The right to be informed of and attend all school activities, school performance and any extracurricular activities of the children, including but not limited to sporting events, to participate in parent-teacher conferences and have input into the important educational decisions of the children, and to be informed of any emergency health-care problems and the right to be informed of non-emergency medical problems within 48 hours.

h. Such other visitation upon which the parties can mutually agree.

Custody of Sara should be awarded to defendant subject to plaintiff reasonable and liberal rights of visitation as follows:

a. The right to have Sara Thursday evenings at 6:00 p.m. to Saturday evening at 6:00 p.m.

b. The right to have Sara each Christmas Eve from 5:00 p.m. to Christmas Day at 9:00 a.m.

c. Major holidays to be alternated between the parties.

d. Alternating weekends during the summer school vacation period to coordinate with the two younger children so that all three children are together each weekend.

e. The right to be informed of and attend all school activities, school performance and any extracurricular activities of the children, including but not limited to sporting events, to participate in parent-teacher conferences and have input into the important educational decisions of the children, and to be informed of any emergency health-care problems and to be informed of any emergency health-care problems and the right to be informed of non-emergency medical problems within 48 hours.

f. Such other visitation upon which the parties can mutually agree.

5. Real Property. The house and real property located at 5328 Old Ranch Road, Park City, Utah, should be listed for sale with a real estate agent mutually acceptable to the

parties, and a listing price to be arrived at between the parties in consultation with said real estate agent. Upon the sale of said house and real property, and after payment of the first mortgage obligation to Valley National Mortgage Co. which has a current balance of \$137,000, the second mortgage line-of-credit to Valley Bank which have a current balance of \$34,400, expenses of sale and any out-of-pocket expenses of either party necessary to place the home in marketable condition, and any moving expenses of plaintiff up to the amount of \$5,000, any remaining equity should be divided equally between the parties. An exception to out-of-pocket expenses would be that any painting paid for by defendant should be without reimbursement up to the amount of \$1,200.

a. Plaintiff should have an option for 30 days from the 11th day of February, 1993, to retain said house and real property upon payment to defendant of his equity in the property which payment should be made within 30 days from the time of the exercise of the option. Defendant's equity should be established as one-half of the remaining amount after deducting the first and second mortgage obligations from the sum of \$300,000, the appraised value of said house and real property. Plaintiff's option should be an exclusion from the listing of this property so that in the exercise of this option, no real estate commission will be incurred.

Plaintiff should have the further option of having the right of first refusal in the event of an offer by a third party on the home upon the same terms as said third-party offer so long as the amount received by defendant for his equity is no less than the amount he would have received if a third party offer had been accepted.

b. Until such time as said house and real property has been sold, plaintiff should have the right of exclusive occupancy and should be responsible for payment of the first mortgage obligation. The second mortgage obligation should be paid one-half by each of the parties, and in the event that either party pays more than one-half, then that party is entitled to reimbursement of such excess of the other party's share at the time of the sale of said house and real property.

c. Each party should be ordered to cooperate in any way necessary to expedite and facilitate the sale of said house and real property as the proceeds from the sale constitute the only major asset of the parties and these proceeds will be necessary to meet various liabilities of the parties for which no other funds are immediately available.

d. Plaintiff has requested that any occupancy of the house not occur until after the end of the 1991-1992 school year. While the Court finds that it is in the best interests of the children that they be allowed to stay in this home through the school year, the Court feels that if a sale of the home would

be lost by placing this as a condition of sale, that the need of the parties to sell this home should take priority and preempt any concerns which may exist for the children remaining in the home for the duration of the school year.

6. **Personal Property.** The personal property of the parties should be awarded as follows, with the award to either party to be free of any claim of the other:

a. Each of the parties should be awarded any items of furniture and furnishings and personal possessions currently in his or her own possession except as otherwise expressly hereinafter provided.

b. Each of the parties should make available to the other party any photographs for the purpose of allowing the other party to reproduce the photographs at his or her own expense or to keep duplicate photographs.

c. Defendant should be awarded his personal property currently located in the home occupied by plaintiff.

d. Defendant should be awarded his equipment and personal property stored in the garage and under the tarp on the property currently occupied by plaintiff.

e. Plaintiff should be awarded the smaller Fraughton statuery and the larger Fraughton statuery should be placed in the hands of an art dealer on consignment for sale and with any net proceeds of sale to be divided between the parties.

f. Defendant should be awarded the 1984 Toyota 4-runner.

g. Plaintiff should be awarded the 1983 Toyota Landcruiser.

h. Plaintiff should be awarded the horse trailer.

i. Plaintiff should be awarded the 1976 Ford truck.

j. Plaintiff should be awarded her horses and tack.

k. Plaintiff should be awarded the use of the snowblower so long as she resides in the Park City area, but it should be returned to defendant upon plaintiff moving from the Park City area. Defendant should have the right to use the snowblower to clear construction sites so long as his use does not interfere with plaintiff's need.

l. Defendant is awarded his stock in Coelho Construction Company together with any liabilities.

m. Plaintiff is awarded her premarital Kodak stock.

n. Plaintiff is awarded the Blue Cross/Blue Shield health insurance premium refund and defendant should provide whatever cooperation he can in obtaining a new replacement check.

o. Defendant is awarded the stock in New Classic Development together with any liabilities.

p. Defendant is awarded the parties' interest in Solamere Partnership, together with any liabilities.

7. Debts and obligations. The liabilities of the parties should be assumed and paid as follows:

a. The first and second mortgages on the home at 5328 Old Ranch Road, Park City, should be assumed and paid as set forth in paragraph 5 above.

b. The 1992 income tax liability of the parties should be divided equally between the parties, and the parties should cooperate with their accountant, E. J. Passey, in the preparation of income tax returns either jointly or separately which will provide the lowest total tax liability. Defendant should be responsible for and pay for the cost of this tax preparation.

c. Defendant should be responsible for any liabilities in connection with Coelho Construction Company, New Classic Development and Solamere Partnership.

d. Each party should be responsible for the payment of any liabilities which he or she has individually incurred since the separation of the parties in October, 1991.

8. Income Determination. The Court heard testimony from plaintiff concerning her income history and capacity to earn income, testimony from two accountants concerning the parties'

historical income and defendant's income for 1992, a proffer concerning defendant's current earning capacity, and copies of the parties' tax returns for the past ten years together with summaries. The Court having reviewed and considered all the evidence, finds that based upon the current circumstances defendant has an earning capacity of \$5,000 per month and plaintiff has an earning capacity of \$1,500 per month, and the Court's findings related to child support and alimony are based upon these income expectancies.

Specifically, the Court finds that defendant is a small independent contractor who has had good years and bad years. It appears that 1992 was a good year but the income related primarily to one project, and it further appears that defendant earned most of the 1992 income during the first part of the year, with very little income for the last part of the year and with no income for the first month of 1993. It is because of these circumstances that the Court finds the expectancy for 1993 of defendant's income is the amount of \$5,000 per month.

Specifically, the Court finds that plaintiff is currently working at employment as a ski instructor and working with disabled children, earning an income substantially below what she has historically earned when she was active as a real estate sales person during the 1985, 1986, 1987 and 1988 years, as reflected in plaintiff's own Exhibit 11. It is anticipated that plaintiff should be able to become more

gainfully employed and after a short period of time earn an income sufficient to meet her own needs based upon her demonstrated ability.

9. Child Support. Consistent with the Child Support Guidelines of the State of Utah, the income determinations set forth in paragraph 8, and the custody arrangement between the parties as set forth in paragraph 4 above, defendant should pay to plaintiff as child support the sum of \$619 per month, commencing with the month of February, 1993, as shown on the Child Support Worksheet attached hereto as Exhibit "A". As a further obligation of support, defendant should be responsible to maintain the children on his currently-held health and accident insurance which has a \$500 deductible and each of the parties should be responsible for one-half of all non-insured medical expenses incurred by any of the three children.

Defendant should have the further obligation to pay to plaintiff one-half of any child care costs which she incurs which are work related. Plaintiff shall provide to defendant an accounting at the end of each month of the time and cost of child care. Defendant should then pay to plaintiff one-half of said amount within ten days of receipt of the accounting.

The Court finds that Tony is currently in need of therapy, and to the extent that expenses are incurred for necessary therapy as that necessity is indicated by his therapist, the cost of this therapy should be paid 70% by

defendant and 30% by plaintiff. This proration is roughly equatable to the proration of income between the parties and, further, takes into consideration the fact that plaintiff should have some substantial responsibility for the cost of therapy as she has control of determining how often therapy is received.

The parties have stipulated that Sara should be seen by a mutually-acceptable therapist on the basis of once a month and in the event of any opinion of the therapist that more therapy is required, then as often as necessary, with each of the parties to be responsible for one-half of the therapy. The choice of a mutually-acceptable therapist for Sara should be determined by the parties in consultation with Dr. Sam Goldstein. Any therapy for Sara with Michelle Miller should be paid by defendant. The division of this cost equally between the parties is different than the division related to Tony's therapy for the reason that defendant shall be responsible for all of the costs of Michelle Miller, who is the current therapist for Sara.

Any obligation for payment of support or medical or therapy expenses shall continue so long as the children are minors and thereafter to high school graduation for any child who turns 18 prior to graduation.

10. Life Insurance. So long as he has an obligation for the payment of child support, defendant should be ordered to maintain a life insurance policy in the face amount of \$250,000 naming either the plaintiff's father, the plaintiff's mother or a

corporate fiduciary as the trustee for the benefit of the parties three children.

11. Alimony. Based upon the findings which the Court has previously set forth above and based upon the living expenses of the parties as set forth in their respective exhibits, defendant should pay to plaintiff as alimony the sum of \$1,000 a month commencing with the month of February, 1993, and continuing for a period of one year to allow plaintiff the opportunity to reestablish her income based upon her demonstrated historical earning capacity. At that time, plaintiff should have the right to petition the Court for a reevaluation to determine whether alimony should be terminated at that time or extended based upon the circumstances then existing.

12. Restoration of maiden name. Plaintiff has requested and should be restored to her previous surname of Van Siclen.

13. Attorney's fees and costs. Plaintiff proffered evidence of attorneys' fees which she had incurred with her prior attorney Mary Corporon and with her present attorney Evelyn R. Saunders and the Court having considered the reasonableness of the fees and the relative ability of the parties to meet the cost of attorney's fees and taking into consideration that defendant shall be responsible for all his own fees, finds that it is reasonable that defendant should be responsible for payment of \$3,000 to plaintiff for her attorneys' fees and costs incurred in

this action, which amount should be paid within 120 days from the 11th day of February, 1993, or upon sale of the house and real property of the parties, whichever occurs first.

14. Permanent restraining order. Each of the parties should be permanently restrained from in any way harassing, threatening or harming the other.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Plaintiff is awarded a Decree of Divorce from defendant on the grounds of irreconcilable differences, which Decree shall become final upon signing and entry.

2. Custody and visitation is awarded as set forth in paragraph 4 of the Findings of Fact.

3. The real property of the parties shall be sold and divided as provided in paragraph 5 of the Findings of Fact.

4. The personal property of the parties is awarded as provided in paragraph 6 of the Findings of Fact.

5. The debts and obligations of the parties shall be assumed and paid as provided in paragraph 7 of the Findings of Fact.

6. Plaintiff is awarded child support from defendant as provided in paragraph 9 of the Findings of Fact.

7. Defendant shall maintain life insurance for the benefit of the minor children as provided in paragraph 10 of the Findings of Fact.

8. Plaintiff is awarded alimony from defendant as provided in paragraph 11 of the Findings of Fact.

9. Plaintiff is restored to her maiden name of Van Siclen.

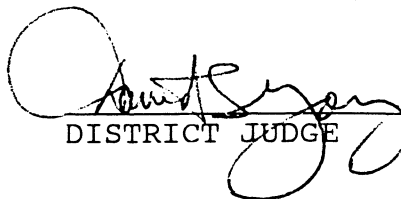
10. Plaintiff is awarded attorneys' fees and costs from defendant in the amount of \$3,000 to be paid as provided in paragraph 13 of the Findings of Fact.

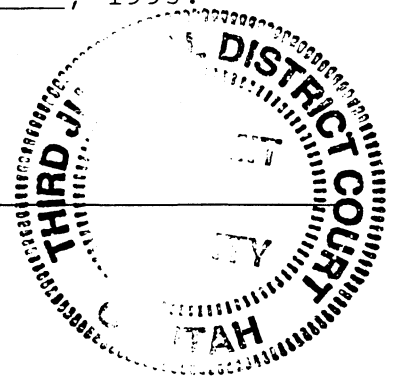
11. Each of the parties is permanently restrained from in any way harassing, threatening or harming the other.

12. Each of the parties is ordered to execute any documents and cooperate in any way necessary to effectuate the terms of the Decree of Divorce when it is entered.

DATED this 20 day of April, 1993.

BY THE COURT:


DISTRICT JUDGE



MAILING CERTIFICATE

I hereby certify that on the 9th day of April, 1993, I
mailed a copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS
OF LAW to:

Evelyn Saunders
401 Main Street
P. O. Box 3418
Park City, UT 84060
Attorney for Plaintiff.

Sharon K. Minkiel

B. L. DART (818)
 DART, ADAMSON & DONOVAN
 Attorneys for Defendant
 310 South Main, Suite 1330
 Salt Lake City, Utah 84101
 (801) 521-6383

"EXHIBIT A"

IN THE DISTRICT COURT OF SUMMIT COUNTY, STATE OF UTAH
 ----oooOooo----

MARY COELHO, :

Plaintiff, :

v. :

ALCIDES J. COELHO, :

Defendant. :

----oooOooo----

CHILD SUPPORT WORKSHEET
 (SPLIT CUSTODY)
 Civil No. 11093
 Judge Young

BASE AWARD CALCULATION	MOTHER	FATHER	COMBINED
1. Number of Children	2	1	3
2. % Children w/each parent	.67	.33	
3a. Gross Monthly Income	1,500.00	5,000.00	/////
3b. Pre-Existing Alimony			/////
3c. Pre-Existing Support			/////
4. Adjusted Monthly Gross	1,500.00	5,000.00	6,500.00
5. Base Combined Child Support from Tables	/////	/////	1,407.00
6. Proportionate Share %	0.23	0.77	/////
7. Parent's Share Support \$	323.61	1,083.39	/////
8. Mother owes father	106.79	/////	
9. Father owes mother	/////	725.87	
10. Children's health insurance premiums paid			/////
11. Child care expense			0.00
12. NET OBLIGATIONS	106.79	725.87	/////
13. BASE SUPPORT AWARD all 12 months (father to mother)	/////	/////	619.08
14. CHILD CARE at 50%			0.00

B. L. DART (818)
DART, ADAMSON & DONOVAN
Attorneys for Defendant
310 South Main, Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

No.

FILED

APR 29 1993 15:14

Clerk of Summit County

By
Deputy Clerk

IN THE DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

---oooOooo---

MARY COELHO,

:

Plaintiff,

:

DECREE OF DIVORCE

v.

:

ALCIDES J. COELHO,

:

Case No. 11093

Defendant.

:

Judge Young

---oooOooo---

The above-entitled matter came on regularly for trial on Thursday, the 11th day of February, 1993, at the hour of 9:00 a.m., plaintiff appearing in person and by her attorney Evelyn R. Saunders, and defendant appearing in person and by his attorney B. L. Dart, and the plaintiff having testified and two accountants having testified and defendant's testimony having been proffered and other matters were submitted by proffer and the Court having received exhibits and the matter having been submitted and the Court being fully advised and having made and entered its Findings of Fact and Conclusions of Law, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Decree and Grounds. Each of the parties is awarded a Decree of Divorce one from the other on the grounds of irreconcilable differences, which shall become final upon signing and entry.

2. Custody and Visitation. Three children have been born as issue of this marriage: Sara, born August 7, 1978, who is 14 years of age; Tony, born August 19, 1980, who is 12 years of age; and Emily, born September 29, 1986, who is six years of age. Plaintiff is awarded the care, custody and control of Emily and Tony, subject to defendant's reasonable rights of visitation, which shall be as follows:

a. The right to have these two younger children, each Monday evening from 5:00 p.m. to 8 p.m. for CCD and so long as they are attending CCD.

b. The right to have the two younger children each Wednesday evening from 5:00 p.m. until Thursday morning and then take them to school.

c. The right to have the two younger children each Saturday evening from 6:00 p.m. to Sunday at 6:00 p.m.

d. The right to have all three children each Christmas Day from 9:00 a.m. to 6:00 p.m.

e. All other major holidays to be alternated between the parties.

f. During the summer school vacation period, the visitation schedule shall change to alternating weekends and be adjusted so that all three children are together each weekend.

g. The right to be informed of and attend all school activities, school performance and any extracurricular activities of the children, including but not limited to sporting events, to participate in parent-teacher conferences and have input into the important educational decisions of the children, and to be informed of any emergency health-care problems and the right to be informed of non-emergency medical problems within 48 hours.

h. The right to be informed of all school activities, school performance and any extracurricular activities where the children are performing and any emergency medical health-care problems.

i. Such other visitation upon which the parties can mutually agree.

Custody of Sara is awarded to defendant subject to plaintiff reasonable and liberal rights of visitation as follows:

a. The right to have Sara Thursday evenings at 6:00 p.m. to Saturday evening at 6:00 p.m.

b. The right to have Sara each Christmas Eve from 5:00 p.m. to Christmas Day at 9:00 a.m.

c. Major holidays to be alternated between the parties.

d. Alternating weekends during the summer school vacation period to coordinate with the two younger children so that all three children are together each weekend.

e. The right to be informed of and attend all school activities, school performance and any extracurricular activities of the children, including but not limited to sporting events, to participate in parent-teacher conferences and have input into the important educational decisions of the children, and to be informed of any emergency health-care problems and to be informed of any non-emergency medical problems within 48 hours.

f. Such other visitation upon which the parties can mutually agree.

3. Real Property. The house and real property located at 5328 Old Ranch Road, Park City, Utah, is ordered to be listed for sale with a real estate agent mutually acceptable to the parties, and a listing price to be arrived at between the parties in consultation with said real estate agent. Upon the sale of said house and real property, and after payment of the first mortgage obligation to Valley National Mortgage Co. which has a current balance of \$137,000, the second mortgage line-of-credit to Valley Bank which have a current balance of \$34,400, expenses of sale and any out-of-pocket expenses of either party necessary to place the home in marketable condition, and any moving expenses of plaintiff up to the amount of \$5,000, any

remaining equity is ordered to be divided equally between the parties. An exception to out-of-pocket expenses would be that any painting paid for by defendant shall be without reimbursement up to the amount of \$1,200.

a. Plaintiff shall have an option for 30 days from the 11th day of February, 1993, to retain said house and real property upon payment to defendant of his equity in the property which payment is ordered to be made within 30 days from the time of the exercise of the option. Defendant's equity shall be established as one-half of the remaining amount after deducting the first and second mortgage obligations from the sum of \$300,000, the appraised value of said house and real property. Plaintiff's option shall be an exclusion from the listing of this property so that in the exercise of this option, no real estate commission will be incurred.

Plaintiff shall have the further option of having the right of first refusal in the event of an offer by a third party on the home upon the same terms as said third-party offer so long as the amount received by defendant for his equity is no less than the amount he would have received if a third party offer had been accepted.

b. Until such time as said house and real property has been sold, plaintiff shall have the right of exclusive occupancy and is ordered to be responsible for payment of the first mortgage obligation. The second mortgage obligation

shall be paid one-half by each of the parties, and in the event that either party pays more than one-half, then that party is entitled to reimbursement of such excess of the other party's share at the time of the sale of said house and real property.

c. Each party is ordered to cooperate in any way necessary to expedite and facilitate the sale of said house and real property as the proceeds from the sale constitute the only major asset of the parties and these proceeds will be necessary to meet various liabilities of the parties for which no other funds are immediately available.

d. While it is in the best interests of the children that they be allowed to stay in this home through the end of the 1991-92 school year, if a sale of the home would be lost by placing this as a condition of sale, the need of the parties to sell this home shall take priority and preempt any concerns which may exist for the children remaining in the home for the duration of the school year.

4. **Personal Property.** The personal property of the parties is awarded as follows, with the award to either party to be free of any claim of the other:

a. Each of the parties is awarded any items of furniture and furnishings and personal possessions currently in his or her own possession except as otherwise expressly hereinafter provided.

b. Each of the parties is ordered to make available to the other party any photographs for the purpose of allowing the other party to reproduce the photographs at his or her own expense or to keep duplicate photographs.

c. Defendant is awarded his personal property currently located in the home occupied by plaintiff.

d. Defendant is awarded his equipment and personal property stored in the garage and under the tarp on the property currently occupied by plaintiff.

e. Plaintiff is awarded the smaller Fraughton statuery and the larger Fraughton statuery is ordered to be placed in the hands of an art dealer on consignment for sale and with any net proceeds of sale to be divided between the parties.

f. Defendant is awarded the 1984 Toyota 4-runner.

g. Plaintiff is awarded the 1983 Toyota Landcruiser.

h. Plaintiff is awarded the horse trailer.

i. Plaintiff is awarded the 1976 Ford truck.

j. Plaintiff is awarded her horses and tack.

k. Plaintiff is awarded the use of the snowblower so long as she resides in the Park City area, but it is ordered to be returned to defendant upon plaintiff moving from the Park City area. Defendant shall have the right to use the

snowblower to clear construction sites so long as his use does not interfere with plaintiff's need.

1. Defendant is awarded his stock in Coelho Construction Company together with any liabilities.

m. Plaintiff is awarded her premarital Kodak stock.

n. Plaintiff is awarded the Blue Cross/Blue Shield health insurance premium refund and defendant is ordered to provide whatever cooperation he can in obtaining a new replacement check.

o. Defendant is awarded the stock in New Classic Development together with any liabilities.

p. Defendant is awarded the parties' interest in Solamere Partnership, together with any liabilities.

5. Debts and obligations. The liabilities of the parties are ordered to be assumed and paid as follows:

a. The first and second mortgages on the home at 5328 Old Ranch Road, Park City, shall be assumed and paid as set forth in paragraph 5 above.

b. The 1992 income tax liability of the parties is ordered to be divided equally between the parties, and the parties are ordered to cooperate with their accountant, E. J. Passey, in the preparation of income tax returns either jointly or separately which will provide the lowest total tax liability.

Defendant is ordered to be responsible for and pay for the cost of this tax preparation.

c. Defendant is ordered to be responsible for any liabilities in connection with Coelho Construction Company, New Classic Development and Solamere Partnership.

d. Each party is ordered to be responsible for the payment of any liabilities which he or she has individually incurred since the separation of the parties in October, 1991.

6. Child Support. Consistent with the Child Support Guidelines of the State of Utah, and based upon an income of \$5,000 attributed to the defendant and \$1,500 attributed to the plaintiff, and based upon the custody arrangement between the parties as set forth in above, defendant is ordered to pay to plaintiff as child support the sum of \$619 per month, commencing with the month of February, 1993. As a further obligation of support, defendant is ordered to be responsible to maintain the children on his currently-held health and accident insurance which has a \$500 deductible and each of the parties is ordered to be responsible for one-half of all non-insured medical expenses incurred by any of the three children.

Defendant shall have the further obligation to pay to plaintiff one-half of any child care costs which she incurs which are work related. Plaintiff shall provide to defendant an accounting at the end of each month of the time and cost of child

care. Defendant shall then pay to plaintiff one-half of said amount within ten days of receipt of the accounting.

To the extent that expenses are incurred for necessary therapy for the parties minor son, Tony, as that necessity is indicated by his therapist, the cost of this therapy is ordered to be paid 70% by defendant and 30% by plaintiff.

The parties daughter Sara shall be seen by a mutually-acceptable therapist on the basis of once a month and in the event of any opinion of the therapist that more therapy is required, then as often as necessary, with each of the parties to be responsible for one-half of the therapy. The choice of a mutually-acceptable therapist for Sara shall be determined by the parties in consultation with Dr. Sam Goldstein. Any therapy for Sara with Michelle Miller shall be paid by defendant. The division of this cost equally between the parties is different than the division related to Tony's therapy for the reason that defendant shall be responsible for all of the costs of Michelle Miller, who is the current therapist for Sara.

Any obligation for payment of support or medical or therapy expenses shall continue so long as the children are minors and thereafter to high school graduation for any child who turns 18 prior to graduation.

7. Life Insurance. So long as he has an obligation for the payment of child support, defendant is ordered to maintain a life insurance policy in the face amount of \$250,000

naming either the plaintiff's father, the plaintiff's mother or a corporate fiduciary as the trustee for the benefit of the parties three children.

8. Alimony. Based upon the present financial circumstances of the parties, defendant is ordered to pay to plaintiff as alimony the sum of \$1,000 a month commencing with the month of February, 1993, and continuing for a period of one year to allow plaintiff the opportunity to reestablish her income based upon her demonstrated historical earning capacity. At that time, plaintiff shall have the right to petition the Court for a reevaluation to determine whether alimony should be terminated at that time or extended based upon the circumstances then existing.

9. Restoration of maiden name. Plaintiff is restored to her previous surname of Van Siclen.

10. Attorney's fees and costs. Defendant is ordered to pay \$3,000 to plaintiff for her attorneys' fees and costs incurred in this action, which amount is ordered to be paid within 120 days from the 11th day of February, 1993, or upon sale of the house and real property of the parties, whichever occurs first.

11. Permanent restraining order. Each of the parties is permanently restrained from in any way harassing, threatening or harming the other.

12. Mutual Cooperation. Each of the parties is ordered to execute any documents and cooperate in any way

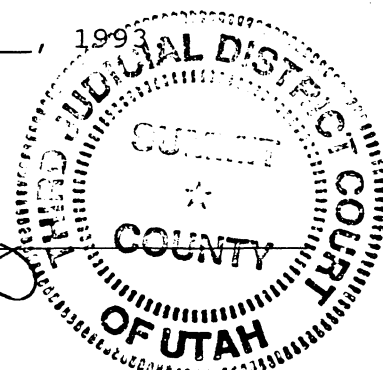
necessary to effectuate the terms of this Decree of Divorce when it is entered.

DATED this 28th day of April, 1993

BY THE COURT:


DISTRICT JUDGE

MAILING CERTIFICATE



I hereby certify that on the 9th day of April, 1993, I mailed a copy of the foregoing DECREE OF DIVORCE to:

Evelyn Saunders
401 Main Street
P. O. Box 3418
Park City, UT 84060
Attorney for Plaintiff.

